Massachusetts Bar Association

Address by Margaret H. Marshall

Chief Justice

Supreme Judicial Court

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Thank you, President Fitzgerald, for the honor, and great pleasure, of addressing this annual meeting. It has been an exciting event. As always, I have learned much. I am reinvigorated by the passion for justice so evident throughout this weekend.

I am immensely proud of what we are accomplishing together, as representatives of the bar and bench of our great Commonwealth. Since I was sworn in as Chief Justice in 1999, I have sought to focus our collective attention, and energies, on the constitutional importance of the fair and effective administration of justice. Our Constitution envisions not only substantive rights, not only a structure dividing power among the three branches of government, but a system that ensures that laws are administered fairly. Chief Justice Lemuel Shaw wrote, "it was the great purpose of [the Constitution's] founders to provide a system of free government for all coming time; to this end to ensure certainty in the making and administration of laws; to secure the peace of the whole, and the protection of every individual, by that certainty which shall make it affect every subject alike. . . . To ensure that certainty, it was indispensable that there should be a faithful,

firm and uniform administration of law".[1]

Today I ask you to join me in celebrating all of the judges, clerks, judicial employees, attorneys, and jurors appearing in our courts who strive every day to give meaning to Chief Justice Shaw's admonition. Each of us can and does make a difference.

We have, in the space of a few short years, created the ingredients for lasting success in the administration of justice: the plan, the leadership, and the focus to bring our courts proudly forward into the Twenty-First Century.

The plan: management objectives laid out clearly and compellingly in the 2003 Report of the Visiting Committee on Management in the Courts, the so-called "Monan Committee." A blue-ribbon panel of management experts gave us the real-world roadmap for reform to mark a path to excellence.

The leadership: women and men firmly committed to bold new approaches and proven best practices in all aspects of judicial administration.

In the Appeals Court: Chief Justice Christopher J. Armstrong, who continues to reduce the backlog of cases that had built up when the Appeals Court was severely understaffed. In our Trial Courts: Chief Justice for

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[1] *Commonwealth* v. *Anthes*, 5 Gray 185, 235 (1855).

Administration and Management Robert A. Mulligan. His vision for the Trial Court is to continue the work of creating a court system that is, as he puts it, "lean and efficient and bristling with energy in delivering justice" to the people of the Commonwealth. Chief Justice Mulligan brings the full measure of his energy, discipline, intelligence, and immense managerial talent to the administrative challenges in the Trial Courts. Consider this: the Monan Committee issued its Report three short years ago. Now we have: time standards in all seven departments of the trial court, in civil and criminal matters; staffing models to guide our scarce resources to where they are most needed; a plan to improve case flow management using standards developed by the National Center for State Courts. And so much more.

I also commend to you the Chief Justices of our Trial Court, who, under Chief Justice Mulligan's leadership, serve as an extraordinarily collaborative and productive "cabinet" for Chief Justice Mulligan. They not only manage the complex work in their individual departments, but they also bring their shared vision and collective energy to bear on the larger challenges facing our system as a whole.

We have the leadership and we have an essential blueprint for change.

We also now have the focus to make the most of all of our efforts. In the hurly burly of our daily work, it is easy to lose sight of long-range goals. It is tempting to settle for band-aid solutions that just "get us through the day." But sustaining a passion for excellence in the delivery of justice over the long haul requires consistent, integrated focus.

We have that focus. Court reform does not proceed piecemeal. Each improvement in court administration builds on the improvements before and lays the groundwork for improvements to come. Each is part of a dynamic process. Our deliberate, long-term approach is producing results. This afternoon I would like to offer you a snapshot of that dynamic process.

One example: the Monan Report was highly critical of the haphazard way in which our courts were staffed. It urged us to implement rational, objective staffing models. We now have staffing models created by Trial Court judges and staff from all seven departments of the Trial Court, in conjunction with the National Center for State Courts. When Chief Justice Mulligan testified before the Joint Committee on Ways and Means last year in support of the fiscal year 2006 Trial Court budget request, he requested additional funds to add personnel to our understaffed courts. How did he

support that request? With staffing models. Those of us who were present were proud -- and gratified -- to see how effective such a presentation can be. Not surprisingly, legislators responded very positively. One hundred eight new positions were added in our Trial Courts. Using the staffing models, Chief Justice Mulligan allocated these positions among courts according to demonstrated need.

Success stories like this tell us that our long-range plan for administrative excellence is working. That is not my assessment alone. We in the Judicial Branch have an institutional partner and mentor in progress: the Court Management Advisory Board. The Board was created by the Legislature in 2003 to assist and advise the judiciary in improving the administration and management of justice.[2] I am grateful to Attorney Michael B. Keating of Foley Hoag, who graciously gives of his time, energy, and wisdom to serve as the Board's chair, and to the other eminent leaders in the Commonwealth's business and legal communities who have made the commitment to help us in this most effective manner.

In December, 2005, the Court Management Advisory Board issued its

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[2] See G. L. 211B, § 6A (2003).

first annual report. (The Report can be downloaded from the Judicial Branch's website.) The Report assessed our progress in achieving the goals of court reform articulated by the Monan Committee. Board members praised Chief Justice Mulligan and his staff for taking "many important steps" along the road to excellence mapped out in the Monan Report.[3] The Board made recommendations to ensure, in its words, that "the momentum toward transformation continues in measurable ways."[4] Chief Justice Mulligan and the Trial Chiefs are making great progress toward that end, as he explained in his remarks to the Board of Delegates on Thursday.

In their report, the distinguished business and legal professionals who make up the Advisory Board decried the "lack of transferability" – the inability of the Chief Justice for Administration and Management to allocate funds to Court Departments based on need. Experience in prior fiscal years when there was authority to transfer funds demonstrated that it is an effective tool to better manage scarce public resources. According to the Board, the current lack of transferability "impedes sound fiscal management of the court

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[3] Court Management Advisory Board, 2005 Annual Report, at 6 (December 8, 2005).

[4] *Id*. at 7.

system."[5]

The Legislature is a vital partner in our efforts to improve the operations of the courts. We will continue to work closely with the leaders and members of the Legislature to bring best practices to the management of our courts. The people of Massachusetts deserve no less. The inability to transfer resources to where they are most needed is a serious roadblock to judicial reform. Our responsibility, as prudent judicial managers, is not only to do justice, but also to ensure that whatever public resources we are given to accomplish that work are used as carefully and effectively as possible. We need your voice to help us achieve, permanently, that much needed reform.

We have accomplished much. But with apologies to Robert Frost, we have miles to go before we sleep. One continuing area of deep concern to all of us, judges and lawyers alike, is access to justice. Our Commonwealth grows increasingly diverse. Ethnically, economically, linguistically. Every area of the law grows more complex, making the question of legal representation particularly important. Like courts around the nation, ours face a crisis of affordability. Increasingly, those with middle incomes, as

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[5] *Id.* at 5.

well as the poor, are unable to afford lawyers to represent them in court. The legions of self-represented litigants continue to grow, many because they cannot afford, or fear they cannot afford, lawyers.

The challenges posed by self-representation are there for all of us:

- the litigants themselves, naturally
- lawyers, those representing clients in a matter where the opposing party appears pro se, and those waiting in the courtroom while pro se matters take more time than expected, and
- court personnel who struggle to help pro se litigants navigate through a complicated system, and of course
- judges as we try to be fair to all in the proceedings before us.

The affordability crisis poses dangers to our core values. Justice is not a commodity. It is the heartbeat of civil society. When access to justice is not available to all, we sever the basic tie that binds us: faith in fair and equal treatment under law. We all need to have, are entitled to have, this faith: the older resident of a rural community; the small business owner trying to stay afloat in a challenging business climate; the young mother speaking limited English. Not only those who can afford it, but all are entitled to full, fair,

complete justice which is best secured with the assistance of counsel.

Improving access to justice demands planning, leadership, and focus. There are important, positive developments here, too. First, the Supreme Judicial Court's Steering Committee on Self-Represented Litigants. Under the extraordinary leadership of Appeals Court Justice Cynthia J. Cohen, the Steering Committee has developed exciting initiatives to help us deal more effectively with self-represented litigants in our courts. I shall share with you three highlights.

Like most non-lawyers, self represented litigants are often unaware of how a court operates or how best to develop their cases. This confronts judges handling those cases with a recurring dilemma: how to explain our court procedures to the self-represented litigant while remaining faithful to the obligation for fair and neutral adjudication. In addressing self-represented litigants, what are the bounds of judicial discretion?

Judges have asked for our guidance. Now they have it. Chaired by Judge Elaine M. Moriarty of the Probate and Family Court, a Committee of experienced jurists from across the Commonwealth has developed guidelines for judges in all civil hearings involving self-represented litigants. The

guidelines reflect extensive discussions between the committee and judges throughout Massachusetts. I am pleased to announce that the Justices of the Supreme Judicial Court have approved the Judicial Guidelines. We expect that the guidelines will soon be made available to every judge in the Commonwealth, accompanied by what I am sure will be most helpful commentary developed by Judge Moriarty's Committee. Judge Moriarty and the members of your Committee – Judge Thomas P. Billings, Judge Peter F. Doyle, Judge Diana H. Horan, and Judge Thomas C. Horgan -- you have done immeasurably valuable work. Thank you.

A second major development concerns "limited scope representation," also referred to as "discrete task representation" or "unbundling." Simply put, limited scope representation permits attorneys to represent clients for a specific legal task rather than for the duration of litigation. It is targeted to individuals of modest means who would otherwise go to court alone. By allowing lawyers and clients to determine what services the attorney will provide, limited scope representation departs from the traditional full-service model of legal services in a manner that broadens access to justice. An attorney and client might agree, for example, that the attorney will appear at a

hearing on temporary orders for child support but will have no further involvement in the client's divorce.

Those experienced with limited scope representation report that it is a win-win proposition. Judges find that even limited involvement of attorneys enables matters to proceed more expeditiously. Clients benefit from the attorneys' knowledge and skill. Opposing counsel appreciate avoiding the ethical questions regarding communications with self-represented litigants. And the lawyers who provide unbundled legal services? Perhaps the headline in last July's *National Law Journal* says it all: "Firms find new revenue in 'unbundling.'"[6] Lawyers have reported greater job satisfaction at being able to develop an unbundling practice to help more clients of modest means.

Limited scope representation has been endorsed by the American Bar Association, which in 2002, amended its Model Rules of Professional Responsibility to accommodate the practice.[7] It has been implemented with great success in Maine, California, Florida, New Mexico, and at least five

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[6] Leonard Post, "Firms find new revenue in 'unbundling,'" *National Law Journal*, July 4, 2004, at p. 1.

[7] See ABA Model Rules of Professional Conduct, Rule 1.2 (c): "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."

other jurisdictions.[8]

I am pleased to report that a pilot project on limited scope representation is coming to Massachusetts, thanks to the Access to Justice Working Group, another arm of Justice Cohen's Committee. Co-chaired by John G. Dugan, representing this Association, and Ned Notis-McConarty, representing the Boston Bar Association, the Working Group has benefitted greatly from the collective wisdom of an Advisory Group chaired by retired Judge Edward M. Ginsburg of the Probate and Family Court and comprised of court officials and prominent members of the Probate Court bar, many of whom are members of this organization.

Chief Justice Sean M. Dunphy of the Probate and Family Court Department has given his enthusiastic support to pilot projects that will take place in Suffolk and Hampden Probate Courts. This will be done, if all proceeds according to plan, during the fall or winter of next year. First Justice John M. Smoot of Suffolk Probate Court and First Justice David M. Fuller of Hampden Probate Court, have welcomed the pilot projects and have worked closely with the Working Group to ensure its success.

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[8] Leonard Post, *supra* at p. 1.

Limited scope representation will make more lawyers available to more litigants. It will speed the delivery of justice. But we can expect that significant numbers of litigants will continue to represent themselves, for all or part of their case. This is not simply a fact of life. It is a matter of fundamental import. People have a right to self-representation. We all have a duty to respect that right. In part, that means demystifying the courtroom. We know that many pro se litigants arrive in court unfamiliar with the rules and language of the courthouse. Many feel disadvantaged and bewildered at best.

To address this situation another working group of the Steering Committee on Self-Represented Litigants is creating a handbook for people representing themselves in civil matters. In clear, layperson's terms, using a friendly question-and-answer format, the handbook explains the benefits of obtaining counsel and offers resources for finding a lawyer. It advises pro se litigants about courtroom demeanor, personnel, and procedure. The goal is to place the handbook in every clerk's office and law library in the Commonwealth, in public libraries, and on the internet. Ellen M. O'Connor of the Judicial Institute heads the talented committee of court clerks and court

administrators who have labored for months on this project. We owe them our thanks.

I focus on "access to justice" whenever I can when I speak to lawyers and judges and citizens around the Commonwealth. Access to justice means opening courthouse doors. It means ensuring that people, once in our courtrooms, can follow what is going on. There are many courtrooms where the acoustics are so bad that it is virtually impossible for the public to hear the court proceedings. Chief Justice Mulligan's FY 2007 budget contains a request for funding $3.3 million to correct this problem by equipping our courtrooms with new sound systems and digital recording equipment.

Access to justice means demystifying the work of courts. It means transparency of rules and procedures, including our rules of evidence. I need not tell you, hardworking judges and practitioners, that quickly locating an appropriate Massachusetts evidentiary standard can be a challenge. Uncertainty can waste time, create controversy, increase the likelihood of appeal, and hamper the delivery of justice.

The good news? Change is underway. Change initiated by you, the leaders and members of the Massachusetts Bar Association. In May, 2005,

your House of Delegates passed a resolution calling on the Justices of the Supreme Judicial Court to appoint an Advisory Committee on Massachusetts Evidence Law to propose for the court's adoption an official guide to the current Massachusetts law of evidence. The Boston Bar Association and the Massachusetts Academy of Trial Attorneys endorsed your proposal for a comprehensive, official guide on Massachusetts evidence. I am delighted to report that the Justices will create an Advisory Committee on Massachusetts Evidence Law. The Advisory Committee will compile a Guide to Massachusetts evidence law as it currently exists, replete with case law and reporters notes. The Guide will make our rules of evidence more accessible to bench, bar, and the public. It will improve the understanding, teaching, and presentation of Massachusetts evidence. It will advance the delivery of justice.

President Fitzgerald, members of the House of Delegates, and members of the Judicial Administration Section, with a special thanks to Section Chair Marylin A. Beck and Judge Peter W. Agnes, Jr. for all of their work on this initiative – attorneys, litigants, witnesses, and jurors across the Commonwealth will be in your debt.

I emphasize: these are major accomplishments. They are also part of our larger strategy for administrative reform. The mission of excellence in every aspect of our work, which I laid out for you when I became Chief Justice, has gathered momentum. It is moving forward, thanks to this organization, the hard-working members of the judicial branch, the support of our elected representatives, and the advice and assistance of thoughtful people across the Commonwealth.

The movement forward is palpable in countless ways, and in countless areas. But there is one topic I had hoped I would not have to raise again this year: judicial salaries, and the salaries of others in the judicial branch that are linked to judicial salaries. We cannot continue to attract the best and brightest lawyers to serve as judges unless the compensation they receive keeps pace, at a minimum, with the rising financial demands that confront us all. Mortgages, college tuition, and the cost of everyday necessities escalate, but judicial salaries remain flat. We must continue to work together to ensure fair and appropriate compensation for judges. This is what one thoughtful observer has said:

> "[Judges'] whole time, therefore, both for their own

> reputation and for the despatch of justice, must be devoted to the public. Domestic concerns, and, much more, the active pursuit of property, are, in a great degree, inconsistent with their duties; and, as they are thus shut out from the acquisition of wealth, it would seem to be the proper office of the legislature to become the guardians of their families, and the supporters of their independence."[9]

I am determined this year to finish a speech without invoking the name of our second President, but I could not resist quoting from one of his contemporaries. To place in historical context the perennial problem of securing adequate salaries for judges, I have just quoted from a legislative Report on the Salaries of the Judiciary written by Joseph Story in 1806. At the time Story represented Salem in the State Legislature. He went on to become Speaker and then a distinguished Justice of the United States Supreme Court.

Today members of the Legislature likely do not see themselves as "guardians" of judges' families. But our hard-working, talented judges do deserve fair compensation for the important work they do every day. I ask you to continue to assist us toward that end so that legislators, the bar, and the

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[9] Report on the Salaries of the Judiciary (made to the Massachusetts House of Representatives in June, 1806) in the *Miscellaneous Writings of Joseph Story*, edited by William W. Story (1852).

public will, to repeat the words of Joseph Story, be "supporters of their independence."

I conclude as I began. I celebrate our joint commitment to create a judicial branch that gives full meaning to the promise of the Massachusetts Constitution: the right of every person to "obtain . . . justice freely, and without being obliged to purchase it; compleatly, and without any denial; promptly, and without delay conformably to the laws."[10]

I thank you.

[10] Massachusetts Constitution, Part the First, art. 11.